STANDARD CHARTERED BANK MALAYSIA BHD

v.

FORESWOOD INDUSTRIES SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[SUIT NO: 22-147-2001-III(I)]
3 MARCH 2004

CIVIL PROCEDURE: *Summary judgment - Triable issues - Action by plaintiff bank for recovery of sum in respect of banking facilities given to first defendant - Whether first and second defendant raised triable issues - Whether plaintiff had acted unfairly in securing immoderate gains - Whether there was unequal bargaining power - Guarantee executed after loan was granted - Whether unenforceable - Whether plaintiff entitled to judgment against defendants*

This was an appeal brought by the plaintiff against the deputy registrar's decision in dismissing the plaintiff's application for summary judgment against the defendants under O. 14 of the Rules of the High Court 1980 ('RHC'). The plaintiff's claim was for the sum of RM8,577,981.63 being the amount due in respect of banking facilities granted to the first defendant, and which the second defendant guaranteed payment of. The first and second defendants failed to pay the said sum, hence this action and the application for summary judgment. The defendants, in contending the said application, claimed that the plaintiff had acted unfairly when it had taken advantage of the first defendant's weak position during the Asian financial crisis to secure for itself immoderate gains by substantially increasing the interest rates for the overdraft facility ('OD') and temporary overdraft ('TOD'). The defendants further argued that the first defendant had been forced by economic duress or by the virtue of the plaintiff's unequal bargaining power to accept the TOD so that the first defendant could repay the plaintiff for losses incurred by the first defendant on foreign exchange step rate contracts ('FX contracts') that were cancelled due to the financial crisis. As for the second defendant, it claimed that at the time the guarantee was signed, the loan and OD was already on foot and so the plaintiff could not discontinue the facilities. For this reason, the second defendant submitted that consideration could not have flowed to the guarantor by the plaintiff's gesture of continuing to grant the facility and/or forebearing to sue the principal borrower (first defendant). Further, the second defendant asserted that it did not receive the letter of demand dated 1 December 2001

and that the guarantee which it signed on was an ''on demand'' guarantee and so a valid prior demand had to be made on it before the plaintiff could commence this action.

Held:

[1] In respect of the OD and TOD facility, the plaintiff had increased both the base lending rate (BLR) as well as the margin or spread above the BLR. The plaintiff had no direct control over the BLR which fluctuates all the time depending on market conditions and the monetary policy of Bank Negara Malaysia. The Asian financial crisis itself was one of the market conditions affecting the BLR. It was unjustified therefore for the defendants to attempt to make out that the "sky rocketing BLR" resulted from some sort of unconscionable conduct on the plaintiff's part by using its superior position as a banker. (p 329 c-f)

[2] The first defendant was fully aware at all material times what the TOD facility was for. Indeed, although the second letter of offer mentioned that it was for 'working capital', the letter does in fact state that the TOD was "to accommodate the losses resulting from cancellation of FX contracts." The first defendant's complaints about being forced into accepting the TOD under economic duress and being overmatched by the plaintiff's unequal bargaining power was flatly contradicted by what was said in its own undisputed contemporaneous document evidencing the acceptance of the TOD facility. The first defendant's assertion that the plaintiff's claim was unfair and unconscionable must be rejected as it did not give rise to any *bona fide* issues that ought to be tried. (p 333 c-h)

[3] Even if it was open to the second defendant to argue that the loan and OD were already on foot when the guarantee was signed, a reading of the guarantee showed that it was expressed to be a continuing guarantee. Following the case of *Perwira Habib Bank Malaysia Bhd v. Fast Travel Sdn Bhd & Ors* and *Development & Commercial Bank Bhd v. Syarikat Farmco Sdn Bhd & Ors*, it was held that a continuing guarantee includes guaranteeing not only facilities existing at the time of execution of the guarantee but also facilities to be granted in the future and so the plea that a guarantee executed after the loan was granted was unenforceable as it was given for past consideration fails. The second defendant's contention that its guarantee was given for past consideration must be rejected as it did not give rise to any *bona fide* issue that required to be tried. (p 334 c-g)

[4] The plaintiff had produced several documents to sufficiently prove that the postal authority had received for posting by registered post, from the plaintiff's solicitors, an envelope addressed to the second defendant at its registered address. Having proved the above, the plaintiff was entitled to rely on the provisions of cl. 21 of the guarantee to deem that its letter of demand had been received by the second defendant at the expiration of 48 hours after it was posted. The second defendant's insistence of being shown a photocopy of the envelope correctly addressed to it affixed with sufficient postage was nothing but an attempt to create an issue where there was none. (p 335 e-h)

[5] The plaintiff remained entitled to judgment against the defendants as the latter have not discharged the burden upon them of satisfying the court why judgment should not be given against them. The first defendant had overlooked the point that on the plaintiff having complied with the requirements of O. 14 RHC, it *prima facie* became entitled to judgment and that if the first defendant disputed the amount owing, it was for the first defendant to show why, which it had not done. The defendants' assertions did not give rise to independent issues which needed to be investigated at a trial. (pp 335 h-i, 336 h-i & 337 c-d)

[Appeal allowed.]

Case(s) referred to:

Alec Lobb (Garage) Ltd & Ors v. Total Oil GB Ltd [1985] 1 All ER 303 ***(refd)***

Amanah Merchant Bank Ltd v. Lim Tow Choon [1994] 2 CLJ 1 SC ***(refd)***

Arab-Malaysian Finance Bhd v. Chong Chin Shoong [1998] 1 CLJ 887 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Development & Commercial Bank Bhd v. Syarikat Farmco Sdn Bhd & Ors [1988] 3 MLJ 275 ***(foll)***

Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors [1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614 HC ***(refd)***

Hart v. O'Connor [1985] AC 100 ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Fast Travel Sdn Bhd & Ors [1988] 3 MLJ 210 ***(foll)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 2

Other source(s) referred to:

Professor Waddam's, *The Law of Contracts*, 2nd edn, pp 382-384

For the plaintiff - Lim Lip Tze; M/s Reddi & Co
For the defendants - James Lo; M/s George Lo & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner J:
This appeal is brought by the plaintiff against the decision of the learned deputy registrar who on 21 January 2003 dismissed the plaintiff's application for summary judgment against the defendants under O. 14 Rules of the High Court 1980 (hereafter 'the RHC').

The plaintiff's claim is for the sum of RM8,577,981.63 with interest thereon at 9.90% per annum from 1 September 2001 till date of full and final settlement, being the amount due and owing to the plaintiff by the 1st defendant in respect of banking facilities granted to it by the plaintiff and which the 2nd defendant guaranteed payment of.

The plaintiff's claim is based on a letter of offer dated 16 July 1998 (hereafter 'the letter of offer'), in which the plaintiff agreed to grant at the 1st defendant's request, banking facilities to it upon the terms and conditions stated in the letter of offer which the 1st defendant duly accepted. The plaintiff's claim is particularised in the statement of claim as follows:

Facilities	Amount Outstanding (as at 31 August 2001)
(1) Overdraft No. 1	RM2,180,680.91
(2) (Temporary) Overdraft No. 2	RM6,397,300.72
Total:	RM8,577,981.63

The plaintiff also pleaded that it was a term of the letter of offer that the Overdraft No. 1 facility (hereafter 'OD') shall carry interest at the rate of 2.10% per annum above the plaintiffs Base Lending Rate (hereafter 'the BLR') or such rate as may be determined by the plaintiff from time to time, and that the Temporary Overdraft No. 2 facility (hereafter 'TOD') shall carry interest at the rate of 3.00% per annum from time to time. The plaintiff pleaded that its current rate of interest charged in respect of both the OD facility and the TOD facility is 3.5% per annum above the plaintiff's BLR which as at 1 September 2001 was 6.40% per annum, but this is subject to change from time to time.

a It is the plaintiff's case that despite repeated demands on the 1st and 2nd defendant, they have failed to pay the said sum of RM8,577,981.63 or any part thereof. Hence this action and the application for summary judgment.

On being served with the writ of summons herein which is endorsed with the plaintiff's statement of claim, the 1st and 2nd defendant entered an appearance b following which the plaintiff filed its application for summary judgment before the defendants filed their defence.

The defendants have come forward to show cause against the application for summary judgment by raising the following issues and questions, (which I c summarise), which they say ought to be tried:

1. The plaintiff's claim is unfair and unconscionable because the plaintiff had taken advantage of the 1st defendant's weak position during the Asian Financial Crisis:

d (a) to secure for itself immoderate gains by substantially increasing the interest rates for the OD and TOD; and

(b) to force the 1st defendant by economic duress or by virtue of the plaintiff's unequal bargaining power to accept the TOD so that the 1st defendant could repay the plaintiff for losses incurred by the 1st e defendant on foreign exchange step rate contracts that were cancelled due to the Asian Financial Crisis;

2. The letter of guarantee executed by the 2nd defendant on 20 June 1997 is void and unenforceable as it was given for past consideration;

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3. No prior demand for payment had been made against the 2nd defendant under the guarantee and so the plaintiff's claim is fundamentally defective.

This will be an appropriate place to address the requirements of adjectival law governing an application for summary judgment. In *National Company for* g *Foreign Trade v. Kayu Raya Sdn Bhd.* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 the Federal Court held that in every application for summary judgment under O. 14 RHC, the court must be satisfied that:

(a) the case comes within the scope of the Order; and

h (b) the plaintiff has satisfied three preliminary requirements, namely, (i) the defendant must have entered an appearance in the action; (ii) the statement of claim must have been served on the defendant; and (iii) the affidavit in support of the application for summary judgment must comply with the requirements of r. 2 of O. 14 RHC.

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The Federal Court went on to state that if the above requirements are satisfied, then the plaintiff will have established a *prima facie* case and become entitled to judgment – the burden then shifts to the defendant to satisfy the court why judgment should not be given against him or it.

Reverting to the plaintiff's application before me, I am satisfied that the plaintiff has fulfilled all the requirements mentioned by the Federal Court in the *Kayu Raya* case, in that, its claim is not one for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, nor is it a claim based on an allegation of fraud or for specific performance and so clearly comes within the scope of the Order; the defendants have entered an appearance in this action; the statement of claim has been served on them; and the affidavit affirmed by Ms. Cynthia Lo Mee Ling on 7 January 2002 in support of the plaintiff's application fully complies with the requirements of r. 2 of O. 14.

Accordingly, I find that the plaintiff has established a *prima facie* case and is entitled to judgment unless the defendants can, in discharging the burden that has shifted onto them, satisfy me why judgment should not be given against them.

The defendants have raised the several issues which I mentioned earlier, as affording them an arguable defence against the plaintiff's claim. They say that it is not necessary for them to show, at this stage, that they will eventually succeed in their defence and that all they need show is that the issues which they have raised are *bona fide* and deserve to be fully ventilated at a trial.

So the question that must be asked is this: Have the defendants raised *bona fide* issues which ought to be tried?

The approach I should take in determining this question is laid out for my guidance in *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 where Mohamed Azmi SCJ, in speaking for the Supreme Court said:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an Order 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable.

Keeping firmly in mind what was said by the Supreme Court, I now turn to consider whether the issues raised by the defendants are triable, and begin by considering whether the defendants have disclosed an arguable case that the plaintiff's claim is unfair and unconscionable?

With regard to the 1st defendant's assertion that the plaintiff had acted unconscientiously by increasing the interest rates on the OD and TOD, it is the defendants' case that to fully appreciate their complaint on this issue, it must be viewed against the backdrop of two related matters which I will now describe.

The first of these is the Asian Financial Crisis which affected this whole region from late 1997 to early 1998, when the exchange rate between the Malaysian Ringgit and the US Dollar (hereafter 'USD') went from around MR2.5 to past MR4.5 to 1 USD, before being pegged by Bank Negara at MR3.8 to 1 USD. According to the defendants, the court is entitled to take judicial notice of the above fact. The 1st defendant says its business of exporting and importing timber products was adversely affected by the Asian Financial Crisis.

The second matter which the defendants say the court should consider is the fact that the letter of offer which the plaintiff presently sues upon represents a revised version of banking facilities which were offered to the 1st defendant under three previous letters of offer which were dated 30 May 1997 (hereafter 'the first letter of offer'), 10 January 1998 (hereafter 'the second letter of offer'), and 10 February 1998 (hereafter 'the third letter offer') respectively.

The 1st defendant says that in the first letter of offer dated 30 May 1997 interest on the OD of RM1 million was 11.05% per annum ie, 1.75% per annum above the BLR of 9.3%. But by the letter of offer dated 16 July 1998 ie, the letter of offer now being sued on, the interest had increased to 14.2% per annum ie, 2.1% per annum above BLR of 12.1%. As far as the interest charged on the TOD is concerned, the 1st defendant says that this can be traced back to the second letter of offer dated 10 January 1998 when it was offered a temporary OD of RM4.4 million at interest rate of 13.45% per annum ie, 3% above BLR of 10.45 %. Then within about 30 days, the plaintiff issued the third letter of offer dated 10 February 1998 when the plaintiff increased the interest rate to 14.1% per annum ie, 3% per annum above the BLR of 11.1%. Then in its letter of offer dated 16 July 1998 ie, the letter of offer being sued on presently, the interest rate had increased to 15.1 % per annum ie, 3% above BLR of 12.1%.

It is the 1st defendant's case that the plaintiff acted unfairly and unconscientiously when it took advantage of the 1st defendant's weakened position during the Asian Financial Crisis to use its superior bargaining position to overreach and overmatch the 1st defendant by substantially increasing the interest rate to double what was initially offered to the 1st defendant, thereby securing for itself immoderate gains. According to the 1st defendant, the court only needs to look at the quantum of the plaintiff's claim to realise the sheer extent and reprehensibility of the plaintiff's unconscionable conduct which shows that over a period of over three years (1998 to 2001) when the writ was issued, the claim for accrued interest is almost the same as the principal.

Quite apart from the 1st defendant's complaint about the interest rate charged by the plaintiff on the OD and TOD facility, the 1st defendant also takes issue with the circumstances in which the TOD facility itself was granted to it. The 1st defendant says that from around late 1997 to early 1998, at the urging of the plaintiff, the 1st defendant purchased substantial foreign exchange step rate contracts (hereafter 'FX contracts') to cover increases in the USD as the 1st defendant's business of exporting and importing timber products was transacted mainly in USD. However, with the chaotic situation caused by the Asian Financial Crisis, these FX contracts were cancelled resulting in losses to the 1st defendant.

Although the 1st defendant raised questions about who cancelled the FX contracts and complained that it was not supplied with complete records to verify the losses incurred, these are matters which I shall address at a later stage because as I see it, the 1st defendant's real complaint about the granting of the TOD facility to it is this: If the plaintiff had sought to recover the FX losses from the 1st defendant through legal action, the plaintiff would have faced difficulty proving its FX claim because the plaintiff did not maintain proper records of such losses since the plaintiff has been unable to supply the 1st defendant with satisfactory documentation on the FX losses, despite the 1st defendant's request that it should do so. According to the 1st defendant, as a means of overcoming its problem of FX proof, the plaintiff offered the 1st defendant the TOD to pay-off the FX losses and forced the 1st defendant, under economic duress or by virtue of the plaintiff's unequal bargaining power to accept the TOD for that purpose. The 1st defendant says that in that way, the plaintiff managed to obtain repayment to itself of the 1st defendant's FX losses without having to sue for it while the 1st defendant ended up owing the plaintiff for a new and unsought overdraft, ostensibly for "working capital", which it never utilised as working capital because the TOD facility was immediately utilised to pay the FX losses. This, the 1st defendant says, is unfair and unconscionable and must be struck down.

It is the 1st defendant's case that its allegations about the plaintiff's unfair and unconscionable conduct as well as its assertions about the inequality of bargaining power between the plaintiff and the 1st defendant during the Asian Financial Crisis deserve to be investigated and ventilated at a full trial because recently, in *Saad bin Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98, the Court of Appeal adopted the English doctrine of inequality of bargaining power and applied it in a broad and liberal way in Malaysia. In that case the question of inequality of bargaining power arose in the context of the appellant, a non-English speaking farmer who earned part of his income from harvesting coconuts from land which he rented from the respondents, entering into a sale and purchase agreement to sell to the respondents two adjoining parcels of land in 1975 for RM42,000, of which a deposit of RM4,200 was stated as paid to the appellant. The appellant was required by the agreement to convert the title to the 2 lands to an indefeasible one within one year by applying to the authority concerned after obtaining the necessary court order. This was not done and instead the appellant proceeded to terminate the agreement. In 1981 the respondents there sued for specific performance or alternatively damages. The trial court rejected the defence of undue influence and awarded damages of RM1.2 million being half the market value of the property. On appeal, the Court of Appeal reversed the decision and afforded relief to the appellant applying the doctrine of inequality of bargaining power. Before doing so the Court of Appeal had to ask itself first whether the Malaysian Courts would recognise a doctrine wider that that of "undue influence" under our Contracts Act. To answer the question before it the Court of Appeal (per Gopal Sri Ram JCA) looked at the doctrine of inequality of bargaining power in other jurisdictions such as England, Australia, New Zealand, Canada and India, as well as the position in Malaysia before concluding that the best approach was to adopt the English doctrine but apply it in a broad and liberal way as in Canada, bearing in mind that many Malaysians are still vulnerable in matters of commerce and there is insufficient statutory protection afforded to Malaysian consumers.

The position in Canada regarding the doctrine of inequality of bargaining power which the Court of Appeal referred to in *Saad bin Marwi* is summed up in Professor Waddam's *The Law of Contracts*, 2nd edn. pp. 382-4 as being this: "any situation which results in the weaker party being 'overmatched and overreached' will qualify for relief if the stronger party secures an immoderate gain". Where such a situation obtains, the result is that the agreement is an unconscionable bargain and, as such, unenforceable at common law or in equity.

Now, returning once again to the facts of our case and applying the doctrine of inequality of bargaining power in a broad and liberal away, I must again ask: has the 1st defendant made out an arguable case that the plaintiff had taken advantage of the 1st defendant's weakened position in the Asian Financial Crisis to use its superior bargaining power to overmatch and overreach the 1st defendant by 'hiking' the interest rates on the OD and TOD to secure immoderate gains for itself and to force the 1st defendant into accepting the TOD so that it would not need to sue to recover the FX losses from the 1st defendant?

Having given the submissions of the 1st defendant a most careful consideration I regret that the 1st defendant has not done so. I say so for the following reasons. To begin with, the assertion that the plaintiff "had unconscientiously taken advantage of its position" during the Asian Financial Crisis by "substantially increasing the interest rate" must be subjected to close scrutiny. The facts show that in respect of the OD and TOD facility, the plaintiff increased both the BLR as well as the margin or spread above the BLR. As far as the increase in the BLR is concerned, I cannot see on what basis the 1st defendant characterised such increase as unconscientious and meant to secure immoderate gains for the plaintiff. The plaintiff has explained that it has no direct control over the BLR which fluctuates all the time depending on market conditions and, if I may add, the monetary policy of Bank Negara Malaysia. So the Asian Financial Crisis itself, which was not the doing of the plaintiff, was one of the market conditions affecting the BLR. It is totally unjustified therefore for the defendant to attempt to make out that the "sky-rocketing BLR" resulted from some sort of unconscionable conduct on the part of the plaintiff using its 'superior position' as a banker to do so. Further, as pointed out by the plaintiff, the BLR has come down since 1998, and its statement of claim states that the current BLR is 6.40% per annum.

With regard to the increase in the margin or spread from 1.75% to 2.1% and now to 3.5% above BLR which the plaintiff has charged the 1st defendant for the OD and TOD, the 1st defendant says that the imposition of such a margin is unconscientious as first, it represents a "substantial increase" and secondly, the plaintiff took advantage of the unequal bargaining position of the 1st defendant caused by the Asian Financial Crisis to impose harsh and onerous terms in the letters of offer, one of which was the right to increase the interest rates which the 1st defendant had no choice but to accept. Once again, both of the 1st defendant's assertions must be subjected to close scrutiny. With regard to its assertion that the increase in the margin to 3.5% above BLR represents a "substantial increase", the 1st defendant's complaint conveniently ignores the important fact that it had agreed to the plaintiff being allowed to increase the margin or spread and it has not attempted to show on what basis it has labelled

the increase as "substantial". The 1st defendant has not placed anything before the court to show what rate would be regarded as not "substantial" at the material time or even what margins other banks or financial institutions were or are charging above the BLR for OD and TOD's. Without such information or evidence I reject the assertion as a bare one which does not give rise to any *bona fide* issue which requires to be tried.

With regard to the 1st defendant's assertion that it had no choice but to agree with the plaintiff's right to increase the interest margin or spread, I again find this to be but another bare assertion on the part of the 1st defendant because it has not made any attempt to show the court why it could not, if it regarded such a term as harsh and onerous, refuse to accept such a term and instead go elsewhere to obtain the banking facilities that it required. In my view it is not unusual for financial institutions, when affording banking facilities to their customers, to reserve for themselves the right to review the margin of interest rates. I do not think that in reserving to themselves this right they can be accused of sharp practice or of victimising a customer by using their "unequal bargaining power" to overmatch or overreach a customer into accepting such a term for the simple reason that the customer can always go elsewhere to seek his banking facilities if he thinks the terms of borrowing are too harsh or onerous. The position would be quite different of course if the customer can point to some circumstance that prevented him from going else where, such as, for example, that he was pressurised into not doing so by the financial institution for then it is that element which makes the transaction unconscionable as it can be said that the stronger party has acted oppressively or unconscientiously. But there is no allegation of this nature by the 1st defendant here and nothing has been said in the affidavits filed by the defendants to suggest any such conduct by the plaintiff. I should point out that in his submissions counsel for the defendants did say that "unlike normal one – off banking transactions, the borrower here, who was already committed to this creditor, did not have the choice to refuse the loans offered and look for competitive rates from other lenders". This no doubt was an attempt to offer an explanation why the 1st defendant accepted the terms of the letter of offer but this assertion of fact is not made in any of the defendants' affidavits – instead it is made by counsel from the bar table. As such it is inadmissible and I ignore it.

In this regard, it is important not to overlook the fact that in seeking to be relieved of its contract, it is not enough for the 1st defendant to simply assert, without more, that it occupied an unequal bargaining position in relation to the plaintiff during the Asian Financial Crisis. It must go one step further to show that the plaintiff has taken advantage of that position to act unconscientiously so that the transaction entered into is stigmatised as unfair and unconscionable.

In support of what I say, I refer to several cases which appear in the judgment of the Court of Appeal in the *Saad bin Marwi* case itself. In *Hart v. O'Connor* 1985 AC 1000, the contract there was sought to be set aside on various grounds including that the agreement represented an unconscionable bargain in favour of the appellant. In that case Lord Brightman said at p. 1017:

> If a contract is stigmatized as 'unfair' it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It may be convenient to call this 'procedural unfairness'. It may also, in some contexts be described (accurately or inaccurately) as 'unfair' by reason of the fact that the terms of the contract are more favourable to one party than to the other. In order to distinguish this 'unfairness' from procedural unfairness, it will be convenient to call it 'contractual imbalance'. The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue inference or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing.

In *Fui Lian Credit & Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors.* [1991] 1 CLJ 522; ([1991] 2 CLJ (Rep) 614), the 1st defendant there raised a defence that the lease agreement it had entered into was invalid, void and unenforceable because it was lopsided, harsh, oppressive, inequitable and unconscionable. This is what Chong Siew Fai J (as he then was) said about the defence, at p. 526 (p. 619):

> In order that a party may free himself from complying with an agreement he had entered into, he must show that the bargain or some of its terms was unfair and unconscionable. It is not enough to show that, in the eyes of the court, it was unreasonable. A bargain cannot be unfair and unconscionable unless it is shown that one of the parties to it has imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means. *Multiservice Bookbinding Ltd. & Ors. v. Marden* [1987] 2 All ER 489.

His Lordship Chong Siew Fai J, then cited with approval what Dillon LJ had said about unequal bargaining power in *Alec Lobb (Garage) Ltd. & Ors. v. Total Oil G.B. Ltd*. [1985] 1 All ER 303 (CA), in these terms (at p. 620):

> In *Alec Lobb Ltd. v. Total Oil G.B. Ltd.*, Dillon LJ rejected the contention that where there was unequal bargaining power, the test was whether its terms were fair and reasonable and that it was unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable. He went on (p. 313):

> Inequality of bargaining power must anyhow be a relative concept. It is seldom in negotiations that the bargaining powers of parties are absolutely equal. An individual wanting to borrow money from a bank, building security or other financial institution in order to pay his liability or buy name property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor. But Lord Denning MR did not envisage that any contract entered into in such circumstances would, without more, be reviewed by the Courts by the objective criterion of what was reasonable: see *Lloyds Bank Ltd. v. Bundy* [1974] QB 325 at 336. The Courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concept of unconscionable conduct and of the exercise by the stronger of coercive power are thus brought in.

The case of *Alec Lobb (Garages) Ltd. and Others v. Total Oil GB Ltd. (supra)* which was referred to by Chong Siew Fai J, was a case in which the plaintiff there sought to set aside an agreement entered into with the defendant on the ground of inequality of bargaining power. It is sufficient to quote from the head notes of that case, what the English Court of Appeal held in respect of the plaintiff's allegations on inequality bargaining power. It was held:

> (3) where one party had acted extortionately, oppressively or coercively towards the other, the court would in fairness set aside a transaction so made. However, a transaction was not rendered harsh or unconscionable merely because the parties are of unequal bargaining power and the stronger party had not shown that the terms of agreement was fair, just and reasonable. Furthermore, a transaction was not unconscionable merely because a party was forced by economic necessity to make it. On the facts, although the plaintiffs had no realistic alternative, no pressure had been exerted on them by the defendant, which was reluctant to enter into the transaction, and furthermore the plaintiffs themselves had sought the defendant's assistance to avert financial collapse and had sought the prior advice of their solicitors and accountant, which they had chosen to ignore. Accordingly the judge was right to find that the defendant's conduct was not unconscionable or oppressive ...

These cases show that it is not enough to merely allege, without more, that there is inequality of bargaining power or that a party had no alternative but to enter into a transaction because of economic necessity. Neither is the stronger party required to show that the terms of agreement are fair, just and reasonable. To render a transaction as being unfair and unconscionable there must be some evidence of victimisation or taking advantage of another's weakness or of actual or constructive fraud or other circumstances that will lead the court to come

to that conclusion. But as I said earlier, no such circumstances have been shown here by the 1st defendant that would cause the court to say that the allegations need to be investigated further at a trial.

I will now deal with the 1st defendant's complaint that it was forced by the plaintiff under economic duress, and overmatched by the plaintiff's unequal bargaining power into accepting the TOD so as to pay-off its FX losses to the plaintiff, thereby relieving the plaintiff of having to sue for those losses. I find this assertion of the 1st defendant not only inconsistent with undisputed contemporary documents but also inherently improbable.

It is clear to me that the 1st defendant was fully aware at all material times what the TOD facility was for. Indeed, although the second letter of offer mentions that it was for "working capital", the letter does in fact state that the TOD was "to accommodate the losses resulting from cancellation of FX contracts". So by the time the TOD was offered to the 1st defendant in the plaintiffs letter of offer of 16 July 1998 the 1st defendant knew what the TOD was for. Knowing fully well the purpose of the TOD, the Board of Directors of the 1st defendant passed a resolution in the following terms on 17 July 1998 accepting the plaintiff's letter of offer: "It was in the interest of the company, to its benefit and in furtherance of its objects, that the company accept the terms of the Facility Letter and execute the Security Documents as provided thereunder". So the 1st defendant's complaints about being forced into accepting the TOD under economic duress and being overmatched by the plaintiff's unequal bargaining power is flatly contradicted by what is said in its own undisputed contemporaneous document evidencing the acceptance of the TOD facility. It must not be overlooked that the 1st defendant is not a small village business concern going cap in hand to the plaintiff bank – it is a corporate entity run by directing minds who engaged the company in international trade and the TOD was accepted by those same directing minds. There is no suggestion that the directors of the 1st defendant are poor uneducated village folk. It is therefore inherently improbable that the 1st defendant's board of directors would pass a resolution to the above effect if the company was being forced, coerced and overmatched into accepting the TOD facility.

For all the above reasons, the 1st defendant's assertion that the plaintiff's claim is unfair and unconscionable must be rejected as it does not give rise to any *bona fide* issues that ought to be tried.

I will next deal with the 2nd defendant's contention that the letter of guarantee it executed on 20 June 1997 is void and unenforceable as it was given for past consideration. The point taken by the 2nd defendant revolves around the fact that the first letter of offer is dated 30 May 1997, whereas the guarantee it executed is dated 20 June 1997. It is the 2nd defendant's case that at the time the guarantee was signed, the loan and OD was already on foot and so the plaintiff could not, even if it had wanted to, discontinue the facilities. For this reason, the 2nd defendant says that consideration could not have flowed to the guarantor by the plaintiff's gesture of continuing to grant the facility and/or forebearing to sue the principal borrower (1st defendant).

I regret I cannot agree with the 2nd defendant's contention. In the first place, the plaintiff's claim is based on the letter of offer dated 16 July 1998 and not the first letter of offer of 30 May 1997, and so the 2nd defendant's reliance on past consideration is a non-issue. In the second place, even if it is open to the 2nd defendant to argue that the loan and OD were already on foot when the guarantee was signed, a reading of the guarantee shows that it is expressed to be a continuing guarantee.

In *Perwira Habib Bank Malaysia Bhd. v. Fast Travel Sdn. Bhd. & Ors.* [1988] 3 MLJ 210 and *Development & Commercial Bank Bhd. v. Syarikat Farmco Sdn. Bhd. & Ors.* [1988] 3 MLJ 275 it was held by Siti Norma J (as she then was) and Lamin J (as he then was) respectively, that a continuing guarantee includes guaranteeing not only facilities existing at the time of execution of the guarantee but also facilities to be granted in the future and so the plea that a guarantee executed after the loan is granted is unenforceable as it was given for past consideration fails. I respectfully agree with the reasoning in the above two cases although counsel for the 2nd defendant says they were wrongly decided. I do not think they were. Accordingly, the 2nd defendant's contention that its guarantee was given for past consideration, must be rejected as it does not give rise to any *bona fide* issue that requires to be tried.

Next to be considered is the 2nd defendant's assertion that it did not receive the letter of demand dated 1 December 2001 which was sent to it by the plaintiff's solicitors by Registered Post, addressed to it at its registered office. It is the 2nd defendant's case that the guarantee which it signed was an "on demand" guarantee and so a valid prior demand had to be made on it before the plaintiff could commence this action. The 2nd defendant has insisted that in order to prove that its letter of demand was posted, the plaintiff must produce a photocopy of the envelope to show that the letter was correctly addressed and affixed with sufficient postage.

I regret I find the 2nd defendant's insistence untenable. By cl. 21 of the guarantee the 2nd defendant had agreed that "[A]ny notice of demand by the Bank under this Guarantee ... sent or transmitted to the address of the Guarantor last known to the Bank shall be deemed to have been received by the Guarantor ... if sent by post at the expiration of forty-eight (48) hours after it has been posted notwithstanding that it is returned undelivered ... .

As proof that its letter of demand was sent by post addressed to the 2nd defendant at its registered address, the plaintiff produced the following documents:

(a) a copy of the search conducted on the 2nd defendant at the then Registrar of Companies which showed that its registered office as at 24 January 2000 was Level 3, 61 Block B, Taman Sri Sarawak Mall, Jalan Tunku Abdul Rahman, Kuching;

(b) a copy of the plaintiff's solicitors letter of demand dated 1 October 2001 addressed to the 2nd defendant at its registered address abovementioned, which letter bears the reference "LLS/TPL/S105/00";

(c) a copy of the registered post receipt issued by the postal authorities showing that the envelope addressed to the 2nd defendant at its registered office and bearing reference LLS/TPL/S105/00 was received for posting on 3 October 2001 by way of Registered Post.

In my judgment, the above documents sufficiently prove that on 30 October 2001 the postal authority received for posting by Registered Post, from the plaintiff's solicitors, an envelope addressed to the 2nd defendant at its registered address. Having proved the above, the plaintiff is entitled to rely on the provisions of cl. 21 of the guarantee to deem that its letter of demand had been received by the 2nd defendant at the expiration of 48 hours after it was posted. See the cases of *Amanah Merchant Bank Bhd. v. Lim Tow Choon* [1994] 2 CLJ 1 and *Arab-Malaysian Finance Bhd. v. Chong Chin Shoong* [1998] 1 CLJ 887.

In the circumstances the 2nd defendant's insistence of being shown a photocopy of the envelope correctly addressed to it affixed with sufficient postage is nothing but an attempt to create an issue where there is none. It must be rejected as incapable of raising any *bona fide* triable issue.

It follows from what I have said so far that the plaintiff remains entitled to judgment against the defendants as they have not discharged the burden upon them of satisfying the court why judgment should not be given against them. I should mention for completeness that in coming to the above conclusion I

have not found it necessary to deal with certain issues raised by both parties in the course of arguments. I have not done so as I considered these matters to be peripheral to the main issues discussed above and they did not give rise to my dispute or issue in their own right which required to be tried. The matters I refer to are these. A difference arose between the 1st defendant and the plaintiff as to who cancelled the FX contracts but I do not see the dispute as giving rise to any issue that needs to be investigated at a trial because it is not in dispute that the FX contracts were in fact cancelled and there is no allegation of any impropriety in that regard. The same may be said about the 1st defendant's assertions that the FX contracts were made by telephone, cancellations were not effected in writing, and it was not supplied with a complete record of the same for verification of the amount of the losses. In my judgment these assertions do not give rise to independent issues which need to be investigated at a trial because they relate to the lack of adequate information relating to the FX losses and not to any impropriety in their making or cancelling. As far as the amount of the losses arising from the cancelled FX contracts are concerned, the 1st defendant accepted the quantum thereof as being RM4.4 million because it is the 1st defendant's case that although it is mentioned in the second and third letters of offer that the TOD facility of RM4.4 million was offered as "working capital", in reality it was "to accommodate the losses resulting from cancellation of FX contracts" and the plaintiff has not tried to disguise the purpose of the TOD because it is in fact expressly stated to be so in the third letter of offer. It is also my view the 1st defendant's complaints of not being supplied proper records about the FX contracts must be viewed as part and parcel of its real complaint regarding the granting of the TOD facility to it.

The same may be said about the defendants taking issue with the plaintiff for exhibiting the 1st defendant's bank statements for some eight months only (January 2001 to August 2001) and not for the whole period of the borrowing. There is absolutely nothing to the point taken as I see it as an attempt by the defendants to create an issue out of a non-issue, because the purpose of the plaintiff in only producing the 1st defendant's bank statements for that period of time was to show that it had been sending bank statements to the 1st defendant in which the outstanding sum on the OD and TOD were shown as well as the interest being charged was shown, but the 1st defendant had never once protested to the interest charged or of any other discrepancies and only did so when action was brought against them. The 1st defendant seems to overlook the point that on the plaintiff having complied with the requirements of O. 14 RHC, it *prima facie* becomes entitled to judgment and that if the 1st defendant disputes the amount owing, it is for the 1st defendant to show why, which it has not done in this case.

I have also not found it necessary to consider the plaintiff's reliance on a document called a "call report" in relation to the FX contracts which is the plaintiff bank's own internal document, to show that the 1st defendant's officer one, Ms. Doris Lim had met with the plaintiff's manager to request for the TOD to cater for the FX losses. I did not do so because the purpose of the TOD was stated in the second letter of offer and the 1st defendant already well knew its purpose when it accepted the letter of offer of 16 July 1998.

Another document I have not considered it necessary to look at is the 'private and confidential' letter dated 21st April, 2000 written by the defendants' accountants to the plaintiff, proposing to settle the 1st defendant's debt under a scheme of arrangement. The defendants say their accountant's letter should be treated the same way as a "without prejudice" communication between parties and should not be looked on as an admission of its debt to the plaintiff. I have not found it necessary to look at this letter because even without it, for the reasons I have given the issues which the defendants have raised here are not *bona fide* issues which require to be tried.

For all the above reasons I allow the plaintiff's appeal with costs and order that judgment be entered for it in the terms prayed for.